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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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12 DONALD T. DURBIN,)
13 Plaintiff,)
14 v.)
15 NATIONAL LOAN INVESTORS,)
16 Defendant.)
17 _____)

No. C02-0302 BZ

**ORDER GRANTING PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION**

18 Before the court is plaintiff's motion for a preliminary
19 injunction to restrain defendant from proceeding with a
20 Trustee's sale of plaintiff's real property in Montana pending
21 a final determination of the underlying action for declaratory
22 and equitable relief.¹ In October, 1997, plaintiff borrowed
23 approximately \$160,000 on a personal line of credit he
24 obtained from First Bank (the "first personal debt"). The
25 personal line of credit was secured by plaintiff's real
26 _____

27 ¹ The parties have consented to the jurisdiction of a
28 United States Magistrate Judge for all proceedings including
entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 property in Montana. Plaintiff paid this loan off in 1999.
2 Subsequently, plaintiff again borrowed approximately \$160,000
3 on the personal line of credit (the "second personal debt"),
4 though he contends this debt was unsecured. Defendant claims
5 that in 2001, it purchased this debt from First Bank's
6 successor in interest, U.S. Bank.

7 Meanwhile, plaintiff was sued by U.S. Bank for money owed
8 by A Montana Lifestyle, Inc. and guaranteed by plaintiff (the
9 "corporate debt"). U.S. Bank assigned this guarantee to
10 defendant. In December, 2000, the parties entered into a
11 Settlement Agreement, which included Release and Integration
12 clauses. Plaintiff claims that the Settlement Agreement was
13 intended to govern not just the dispute relating to the
14 corporate debt, but any and all disputes between plaintiff,
15 defendant and U.S. Bank, including any dispute relating to the
16 second personal debt. Defendant contends that the Settlement
17 Agreement was meant only to govern the parties' dispute over
18 the corporate debt. On April 11, 2002, defendant served
19 plaintiff with a Notice of Trustee's Sale, informing him of a
20 September 9, 2002 sale of plaintiff's real property in Montana
21 which, according to defendant, secures the second personal
22 debt. Plaintiff now moves for a preliminary injunction
23 pursuant to Fed. R. Civ. P. 65 to restrain this sale pending
24 the resolution of this action. Trial is set for December 2,
25 2002.

26 Defendant first argues that the local action doctrine
27 bars this court from enjoining a sale of real property in
28 Montana. The local action doctrine stands for the proposition

1 that "[a] local action involving real property can only be
2 brought within the territorial boundaries of the state where
3 the land is located." Hayes v. Gulf Oil Corp., 821 F.2d 285,
4 287 (5th Cir. 1987)(citing Ellenwood v. Marietta Chair Co.,
5 158 U.S. 105, 107 (1895)).² In other words, "federal and
6 state courts lack jurisdiction over the subject matter of
7 claims to land located outside the state in which the court
8 sits."³ Id.

9 This case is distinguishable. Local actions are those
10 where the transactions upon which they are founded could only
11 have occurred in the location where the real property was
12 situated. See, e.g., Ellenwood, 158 U.S. at 108 (trespass to
13 land and conversion of timber thereon); Livingston v.
14 Jefferson, 15 F. Cas. 660, 667 (No. 8411)(C.C.D. Va.
15 1811)(trespass to land); Hayes, 821 F.2d at 288 (action to
16 terminate interest in land under an oil and gas lease); Still
17 v. Rossville Crushed Stone Co., 370 F.2d 324, 325 (6th Cir.
18 1966), cert. denied, 387 U.S. 918 (1967)(action for damage to
19 real estate). Contrary to defendant's assertions, however,
20 the focus of this action is not the parties' rights with
21

22 ² Although defendant has cited no authority from the Ninth
23 Circuit on the local action doctrine, and this court is aware
24 of none, a number of federal and state courts have recognized
and applied the rule. See Hayes, 821 F.2d at 287 (collecting
cases).

25 ³ There is some dispute over whether the local action
26 doctrine runs to the jurisdiction or the venue of a court, see
27 Trust Co. Bank v. U.S. Gypsum Co., 950 F.2d 1144, 1149 n.7 (5th
28 Cir. 1992), and whether federal or state law should determine
the application of the local action doctrine. See id. at 1149-
50. However, I need not address these questions because, as
shown below, this is not the type of claim to which the local
action doctrine applies.

1 respect to plaintiff's real property in Montana, but their
2 rights and responsibilities under the Settlement Agreement.⁴
3 Determining whether the second personal debt was discharged by
4 the Settlement Agreement would at most only indirectly affect
5 the parties' rights to the property in Montana. Granting
6 plaintiff's motion would merely allow the underlying action to
7 proceed unaffected by the proposed sale. Therefore, the local
8 action doctrine does not limit this court's jurisdiction to
9 grant a preliminary injunction enjoining the sale of the
10 Montana property.

11 A preliminary injunction "is not a preliminary
12 adjudication on the merits but rather a device for preserving
13 the status quo and preventing the irreparable loss of rights
14 before judgment." Sierra On-Line, Inc. v. Phoenix Software,
15 Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). "Preliminary
16 injunctive relief is available to a party who demonstrates
17 either: (1) a combination of probable success on the merits
18 and the possibility of irreparable harm; or (2) that serious
19 questions are raised and the balance of hardships tips in its
20 favor These two formulations represent two points on
21 a sliding scale in which the required degree of irreparable
22 harm increases as the probability of success decreases." A&M
23 Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir.
24 2001)(citing Prudential Real Estate Affiliates, Inc. v. PPR
25 Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000)). See also

27 ⁴ Although defendant argues that plaintiff is asking the
28 court to extinguish the Deed of Trust on his property in
Montana, I find nothing in plaintiff's prayer asking me to do
so. Nor could defendant point to anything during argument.

1 Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co.,
2 Inc., 240 F.3d 832, 839-40 (9th Cir. 2001); Arcamuzi v.
3 Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.
4 1987). "'The critical element in determining the test to be
5 applied is the relative hardship to the parties. If the
6 balance of harm tips decidedly toward the plaintiff, then the
7 plaintiff need not show as robust a likelihood of success on
8 the merits as when the balance tips less decidedly.'" Sierra
9 On-Line, Inc., 739 F.2d at 1421 (quoting Benda v. Grand Lodge
10 of the Int'l Ass'n of Machinists, 584 F.2d 308, 315 (9th Cir.
11 1978), cert. denied, 441 U.S. 937 (1979)).

12 In this case, defendant has not established that it would
13 be harmed if the sale of the Montana property were temporarily
14 enjoined for about 3 months until a final resolution of this
15 action. Its only claim is that it would delay it from
16 enforcing its rights under the security agreement. Plaintiff,
17 on the other hand, has demonstrated that he would suffer
18 irreparable harm if the sale were to proceed. Plaintiff would
19 lose his property in Montana before a decision was rendered on
20 the proper interpretation and scope of the Settlement
21 Agreement. If I were to rule in plaintiff's favor in this
22 action, there would be no legal basis for defendant having
23 sold the property, yet plaintiff would no longer own the
24 property.

25 Furthermore, plaintiff has raised serious questions
26 regarding the interpretation of the Settlement Agreement.
27 Plaintiff points to broad language in the Mutual Release
28 clause indicating the desire of both parties to settle all

1 claims "arising out of the debtor/creditor relationship that
2 originated from Bank's Bozeman, Montana locations." Under
3 California law, "where a written agreement attempts to cover
4 all relationships of the contracting parties, interpretation
5 to be given the contract is determined, as a matter of law,
6 solely from the instrument itself" General Cas. Co.
7 of Am. v. Azteca Films, Inc., 278 F.2d 161, 168 (9th Cir.),
8 cert. denied, 364 U.S. 863 (1960)(citing Republic Pictures
9 Corp. v. Rogers, 213 F.2d 662, 665 (9th Cir.), cert. denied,
10 348 U.S. 858 (1954)). Defendant disputes whether the second
11 personal debt originated in Montana, and seeks to introduce
12 parol evidence of defendant's intent to limit the terms of the
13 Settlement Agreement to the dispute over the corporate debt by
14 claiming that plaintiff fraudulently misrepresented the fact
15 that he had no other debts with U.S. Bank other than the
16 corporate debt. See California State Auto. Ass'n Inter-Ins.
17 Bureau v. Policy Management Sys. Corp., 1996 WL 45280 at *11
18 (N.D. Cal. Jan. 9, 1996)(citing Ron Greenspan Volkswagen, Inc.
19 v. Ford Motor Land Dev. Corp., 32 Cal. App. 4th 985, 992-95
20 (1995))("Under California law, a contract integration
21 provision stating that all representations are contained
22 therein does not bar a claim of fraudulent inducement by parol
23 misrepresentations"); Sanguinetti v. Viewlogic Sys.,
24 Inc., 1996 WL 33967 at *15-16 (N.D. Cal. Jan 24, 1996)(same).
25 In response, plaintiff denies there was any fraud and argues
26 that, in any event, defendant undertook its own investigation
27 of plaintiff's financial history. See Goodman v. Jonas, 142
28 Cal. App. 2d 775, 793 (1956)("It is a well settled rule that

1 where a party relies on his independent investigation after
2 acquiring all the knowledge he desires without hindrance, he
3 will not be heard to say that he relied on the representation
4 of the other party.").⁵

5 Without ruling on the merits, it is clear that plaintiff
6 has raised serious questions for the purpose of granting a
7 preliminary injunction. More importantly, the balance of
8 hardships tip overwhelmingly in plaintiff's favor. Therefore,
9 under the second prong of the preliminary injunction test, I
10 find it appropriate to grant a preliminary injunction to
11 preserve the status quo pending a resolution of this action.

12 Defendant requests a bond pursuant to Fed. R. Civ. P.
13 65(c) in the amount of \$100,000 for anticipated litigation
14 costs. "No restraining order or preliminary injunction shall
15 issue except upon the giving of security by the applicant, in
16 such sum as the court deems proper, for the payment of such
17 costs and damages as may be incurred or suffered by any party
18 who is found to have been wrongfully enjoined or restrained."
19 Fed. R. Civ. P. 65(c). A district court has considerable
20 discretion in setting the amount of the security bond. See
21 Walczak v. EPL Prolong, Inc., 198 F.3d 725, 733 (9th Cir.

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23 ⁵ The parties have also filed a number of objections to
24 evidence. Defendant's first objection is GRANTED as to whether
25 Lucy Goodman requested and received certain forms. Defendant's
26 third objection is GRANTED as to Lucy Goodman's execution of
the Credit Compliance Checklist. Defendant's fifth objection
is GRANTED. Defendant's sixth objection is GRANTED as to
defendant's knowledge. Defendant's second, fourth and seventh
through tenth objections are DENIED.

27 Plaintiff's first through fifth objections to Smith's
28 declaration are DENIED. Plaintiff's sixth through eighth
objections to Smith's declaration are GRANTED as to Ms. Tubbs
representations to Mr. Smith. Plaintiff's objection to Iriki's
declaration is DENIED.

1 1999). "The amount of the bond will generally be what the
2 court deems sufficient to cover losses and damages incurred or
3 suffered by the party enjoined if it turns out that the
4 injunction should not have been granted." AT&T Communications
5 v. Pac. Bell, 1996 WL 940836 at *11 (N.D. Cal. July 3, 1996),
6 aff'd, 108 F.3d 1384 (9th Cir. 1997). Defendant has failed to
7 offer any evidence of damage it would incur by temporarily
8 enjoining the sale of the Montana property. Nor has defendant
9 cited any authority for the proposition that a plaintiff
10 seeking a preliminary injunction must post a security bond for
11 the potential costs in litigating the underlying action.
12 Regardless of whether the sale is enjoined, defendant would
13 still incur the same costs in litigating the underlying
14 action. Therefore, defendant's request for a \$100,000
15 security bond is **DENIED**. However, it is hereby **ORDERED** that
16 plaintiff post security in the amount of \$2,500 for any losses
17 or damages associated with the canceling of the Trustee's
18 sale.

19 Accordingly, pursuant to Fed. R. Civ. P. 65, I hereby
20 **GRANT** plaintiff's motion for preliminary injunctive relief
21 pending the final disposition of this action.

22 Dated: August 28, 2002

23
24 /s/Bernard Zimmerman

25 Bernard Zimmerman
26 United States Magistrate Judge
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